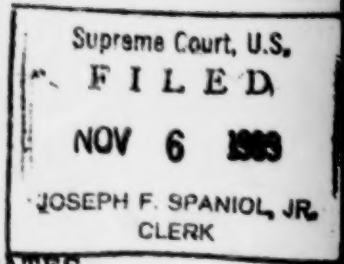


89-744 (1)

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989



---

BARBARA KOUCKY MOODY  
Petitioner

versus

UNITED STATES OF AMERICA  
Respondent

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

PETITION FOR WRIT OF CERTIORARI

---

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QUESTIONS PRESENTED FOR REVIEW

POINT ONE

WHETHER PETITIONER, AS A PRO SE LITIGANT, SHOULD BE HELD TO THE SAME STANDARD OF PROOF AS A COUNSELED DEFENDANT IN MEETING HER BURDEN TO SHOW CAUSE FOR HER PROCEDURAL DEFAULT FOR PURPOSES OF OBTAINING POST-CONVICTION RELIEF UNDER 28 U.S.C. SECTION 2255?

POINT TWO

WHETHER PETITIONER'S MENTAL IMPAIRMENT AND PRO SE STATUS CONSTITUTES CAUSE FOR HER PROCEDURAL DEFAULT FOR PURPOSES OF OBTAINING POST-CONVICTION RELIEF UNDER 28 U.S.C. SECTION 2255?

POINT THREE

WHETHER THE COURT OF APPEALS ERRED IN UPHOLDING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO ALTER, AMEND, OR VACATE SENTENCE FOR FAILURE TO SHOW CAUSE FOR HER PROCEDURAL DEFAULT WITHOUT ORDERING A HEARING TO RESOLVE FACTUAL ISSUES NOT EVIDENT FROM A REVIEW OF THE RECORD.



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No. \_\_\_\_\_

IN THE  
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OCTOBER TERM, 1989

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BARBARA KOUCKY MOODY  
Petitioner

versus

UNITED STATES OF AMERICA  
Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT  
CAUSE NUMBER 88-3978

---

Petitioner, BARBARA KOUCKY MOODY,  
respectfully prays that a writ of  
certiorari issue to review the judgment  
and opinion the United States Court of  
Appeals for the Eleventh Circuit entered  
in the above entitled cause on September  
7, 1989.





## OPINION BELOW

A per curiam decision, without opinion of the United States Court of Appeals for the Eleventh Circuit, was rendered affirming the District Court's denial of Petitioner's Motion to Vacate, Alter, or Amend Conviction or Sentence pursuant to 28 U.S.C., Section 2255 holding that Petitioner failed to show cause for her procedural default in not raising the issue of the trial court's failure to make findings under Rule 32(c)(3)(D), F.R.Cr.P. on direct appeal or Rule 35(b) F.R.Cr.P. The Eleventh Circuit's opinion is unreported, No. 88-3978 and is appended to this petition as Appendix A. No rehearing was requested. The trial court's opinion is appended to this petition as Appendix B.

## JURISDICTION

The District Court's opinion stating that this Petitioner failed to show cause



for her procedural default for not raising issues of constitutional magnitude in previous proceedings which were filed pursuant to 28 U.S.C., Section 2255 was affirmed by the United States Court of Appeals for the Eleventh Circuit on September 7, 1989. No petition for rehearing was filed. This petition was filed within 60 days of that date. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C., Section 1254 (1).

#### CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal



case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

#### OTHER PROVISIONS INVOLVED

Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure states in pertinent part as follows:

If the comments of the defendant and his counsel, or testimony, or other information introduced by them allege any factual inaccuracy in the presentence investigation report, or the summary of the report, or part thereof, the Court shall, as to each matter controverted make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

Fed. R. Crim. P. 32(c)(3)(D).



## STATEMENT OF THE CASE

### A. Proceedings Below

On December 6, 1984, Petitioner Barbara Koucky Moody was indicted by a Federal grand jury sitting in the Northern District of Florida and charged in a 31-count indictment. On March 23, 1985, Petitioner Moody pleaded guilty to Counts 1, 30, and 31 of the indictment in Case Number 84-07037-WS. <sup>1</sup> (R \_\_\_\_-1-1).

On May 18, 1985, a sentencing hearing was conducted and Petitioner Moody was sentenced to 45 years under the provisions of 18 U.S.C. 4205(c) and (d), for a study to be conducted by the Bureau of Prisons. During the course of that sentencing hearing, numerous objections were made to

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<sup>1</sup>References to the original papers, exhibits, and transcripts of proceedings are designated by the volume, document number, and page number. In some instances where the Court did not indicate a volume number, the record will be cited as R\_\_\_\_- then document number and page number.





matters contained in the Pre-Sentence Investigation Report. (R1-116-2-9, 11-13, 15-19, 36) The Court failed to make appropriate findings in compliance with Rule 32(c)(3)(D), Federal Rules of Criminal Procedure, although requests were repeatedly made by defense counsel for these findings. Instead, the Court decided to sentence Petitioner Moody to a study and observation to be conducted by the Bureau of Prisons to obtain more information about her. (R1-116-36).

Petitioner Moody was remanded to the custody of the Attorney General to begin the study and observation on May 22, 1985.

On July 30, 1985, a report of the study was prepared by the Bureau of Prisons and submitted to the sentencing court, the Honorable William H. Stafford. The Bureau of Prisons recommended that Petitioner be sentenced to a 15-year



sentence on all three counts, each to run concurrent with the other. (R1-119-1, Order requiring record supplemented with presentence investigation report and Bureau of Prisons Study Report not reflected on docket sheet).

Resentencing in this case was set for September 5, 1985. Another extensive sentencing hearing was conducted during which Petitioner Moody, through counsel, made continued objections to matters contained in the government's version of the presentence investigation report. (R\_\_\_-86, 6-8- 17-18, 24). Once again the Court failed to make appropriate findings pursuant to Rule 32(c)(3)(D), Federal Rules of Criminal Procedure. On September 5, 1985, Petitioner was sentenced to nine-year, five-year, and five-year concurrent 4205(b)(2) sentences and ordered to surrender to Federal custody on October 7, 1985. (R\_\_\_-62-1).



On September 12, 1985, former counsel for Petitioner filed a motion requesting the Court to make a determination as to the offense severity rating to be used by the United States Parole Commission. This motion was denied on the same date. (R\_\_\_-63-1).

Petitioner fled a few days after sentencing and prior to her surrender date. Petitioner had no further contact with her lawyer. A bench warrant was issued based on her failure to surrender voluntarily. A direct appeal from her conviction was never filed.

When Petitioner Moody fled, she went to British Columbia, Canada, with her infant son. When she was apprehended on or about December 9, 1985, she made a very serious attempt to take her own life in the presence of her captors. She was hospitalized with extensive injuries and later transferred to the Federal



Correctional Institution in Lexington, Kentucky, for service of her sentence. (R1-99-1).

On January 8, 1986, Petitioner Moody filed a pro se motion under Rule 35(b), F.R.Cr.P., which was denied on March 31, 1986. (R\_\_\_\_-82-1). The Court noted that the motion was not timely filed. On April 15, 1988, Petitioner Moody filed a Motion through counsel pursuant to 28 U.S.C., Section 2255, to Vacate, Set Aside, or Correct an Illegal Sentence and Memorandum of Law in Support of that Motion. (R1-98,99-1).

The government responded on June 21, 1988, to the motion for relief pursuant to 28 U.S.C., Section 2255 requesting that said motion be dismissed for Petitioner's failure to show cause for her procedural default in not previously raising the claims therein raised. (R1-101-1). On June 29, 1989, Defendant Moody filed a





response to the government's response.  
(R1-102-1).

On September 21, 1989, Magistrate Everett Anderson, issued a Report and Recommendation to the Court. (R1-103-1). The magistrate recommended that the Court dismiss the motion to vacate the sentence due to Petitioner's procedural default for not raising these matters in previous pleadings. In so ruling, the magistrate failed to order an evidentiary hearing to permit Petitioner to resolve any doubt as to whether she was mentally impaired during this time.

On September 30, 1988, Petitioner Moody filed objections to the Magistrate's Report and Recommendation. (R1-104-1). On November 18, 1988, the District Court denied Petitioner's Section 2255 Motion. (R1-109-1). On November 28, 1988, Petitioner filed a Notice of Appeal from



the District Court's denial of the motion. (R1-110-1).

Oral argument before the U.S. Court of Appeals for the Eleventh Circuit was heard in this case on August 31, 1989. A non-published per curiam decision was rendered in this case on September 7, 1989. Rehearing was not requested. Petitioner has filed a timely Petition for Writ of Certiorari.

Petitioner Barbara Koucky Moody is presently confined at the Federal Correctional Institution for Women in Alderson, West Virginia.

B. Statement of the Facts

Petitioner contends that the District Court's failure to comply with the mandates of Rule 32(c)(3)(D), Federal Rules of Criminal Procedure, which requires the Court to make specific findings in response to alleged factual inaccuracies contained in Petitioner



Moody's presentence investigation report prejudiced her in the imposition and execution of her sentence. There is no question that the Court failed to comply with Rule 32(c)(3)(D), F.R.Cr.P. Both the government, in its response to Petitioner's 28 U.S.C., Section 2255 Motion, and the Magistrate, in his Report and Recommendation, concede that the Court failed to make the appropriate findings as required by the rule. The only issue is whether Petitioner has shown sufficient cause for her procedural default in failing to raise this issue so as to allow the granting of relief pursuant to her motion under 28 U.S.C. Section 2255.

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Petitioner Moody offered several explanations for her procedural default which included (a) she was not advised as to her right to appeal the sentence at the



time of sentencing; (b) defendant was suffering a mental impairment and fled the state upon imposition of sentence on September 12, 1989, which severed her relationship with counsel and, for all practical purposes, rendered her a pro se litigant at that time; and, (c) she was under a psychological impairment at the time of her serious suicide attempt which impairment continued after her return to Federal custody when she subsequently filed a Pro Se Motion for Reduction of Sentence pursuant to Rule 35(b), Federal Rules of Criminal Procedure.

Petitioner Moody clearly demonstrated to the Court the prejudice suffered by the Court's failure to comply with Rule 32(c)(3)(D), F.R.Cr.P, by showing the following:

a. Her sentence was based upon or influenced by the Court's consideration of information that was materially false. As





a result, the Bureau of Prisons relied upon a tainted presentence investigation report when it conducted the study and observation of her and subsequently made its sentencing recommendation to the District Court in compliance with Title 18, U.S.C., Section 4205(c). Petitioner Moody provided the District Court with substantial information in support of her Section 2255 Motion confirming that the Bureau of Prisons customarily uses the presentence investigation report as the primary document when evaluating a defendant who has been incarcerated for the purposes of a study and observation pursuant to Title 18 U.S.C., Section 4205(c).

b. The District Court's failure to comply with Rule 32(c)(3)(D) caused clear prejudice to the defendant due to the reliance by the Parole Commission and the Bureau of Prisons on the presentence



investigation report. The significance of this reliance was so evident to Congress in 1983 that it amended Rule 32(c)(3)(D), F.R.Cr.P., so as to require the Court to make findings when there were disputed matters of fact in the report.

c. In failing to make the proper findings under the rules, the Court gave no clue as to what was it believed was true, what it believed was not true, and what it did or did not rely upon for purposes of sentencing. This failure clearly caused prejudice to Petitioner. Specifically, at one point during sentencing the Court stated the following:

I think I have in my mind separated out all of the peripheral issues. (R\_\_\_-85-17).

The District Court, based on the Magistrate's recommendation, dismissed the Section 2255 motion in this case without an evidentiary hearing on disputed issues of fact which would have included



resolution of any issue over her mental capacity at the time of her procedural default on the direct appeal.

The record below indicates that the District Court was concerned about Petitioner's instability and emotional state. This concern was evidenced by the Court's sending Petitioner Moody to the Federal Correctional Institution in Lexington, Kentucky for a study and observation by the Bureau of Prisons prior to imposing a final sentence. This was further noted in the Magistrate's Report and Recommendation as follows:-

In an abundance of caution, however, the Court ordered defendant re-evaluated at the Federal Bureau of Prisons, Lexington, Kentucky facility and imposed a temporary maximum sentence required for such referrals. (Emphasis added). (R1-103-3).

The District Court, at sentencing, made the following comments with regard to obtaining more information about Petitioner:



In view of some rather detailed information that I have received, and trying to do what is fair and just to both you and the government in this case, I am going -- What I am going to do is get some more detailed information concerning you...

I am going to do that, Ms. Moody, to- as I indicated, to get some more information about you in relation to these charges and about you, and I think... (R\_\_\_-85- 36,37).

Furthermore, at sentencing on September 12, 1985, the District Court ordered as part of the sentence that Petitioner Moody undergo mental, emotional, and drug counselling while incarcerated. (R\_\_\_-86- 23).

Petitioner fled with her infant son shortly after her sentencing on September 5, 1985, and was apprehended on or about December 9, 1985, after making a very serious suicide attempt. Petitioner was placed in a body bag and hospitalized. She was a pro se litigant during the time of her flight, suicide attempt, and





throughout the first few years of her incarceration.

C. Jurisdiction Below

The District Court had jurisdiction of this matter below pursuant to 28 U.S.C., Section 2255.



I.

WHETHER PETITIONER, AS A PRO SE LITIGANT, SHOULD BE HELD TO THE SAME STANDARD OF PROOF AS A COUNSELED DEFENDANT IN MEETING HER BURDEN TO SHOW CAUSE FOR HER PROCEDURAL DEFAULT FOR PURPOSES OF OBTAINING POST-CONVICTION RELIEF UNDER 28 U.S.C. SECTION 2255?

REASONS FOR GRANTING THE WRIT

1. The opinion of the Court of Appeals for the Eleventh Circuit sanctions a departure, by a lower court, from the accepted and usual course of judicial proceedings in such a way as to call for the Supreme Court to exercise its power of supervision.
2. The opinion of the Court of



Appeals for the Eleventh Circuit decided a question of federal law in a way in conflict with applicable decisions of the Supreme Court.

#### ARGUMENT AND AUTHORITIES

Federal courts routinely deny motions filed pursuant to ~~28 U.S.C.~~ Section 2255 for failure to show sufficient legal cause for not previously raising the issues presented for the first time in Section 2255 motions. United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed. 2d 816 (1982); Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973); Parks v. United States, 832 F.2d 1244, 1245-46 (11th Cir. 1987). No case has addressed the issues raised by the facts in the instant case. Even where the facts



of some decisions might arguably bear some remote similarity to the facts of the instant case, the decisions of the various circuits take various and divergent positions on just what justifies or constitutes excusable cause for not previously raising certain constitutional violations at earlier stages in the legal process.

The Supreme Court has decided that certain situations constitute cause for a procedural default although there has been precious little in the way of standards for defining cause from the decisions touching the issue. See, Davis v. United States, supra; Francis v. Henderson 425 U.S. 536, 542, 96 S.Ct. 1708, 48 L.Ed.2d (1976).

In the case at bar, the Eleventh Circuit, without opinion, rendered a per curiam decision to affirm the District Court's decision denying Petitioner relief





for failure to show cause for not previously raising an issue of constitutional magnitude which was raised in her 28 U.S.C., Section 2255. Petitioner contended that her procedural default resulted, in part, from her mental impairment which precipitated her flight, after sentencing and ultimately culminated in her serious suicide attempt when approached by the authorities.

The Eleventh Circuit, although without opinion in this case, appeared to rely upon its previous holding in Martorano v. United States, 873 F.2d 283 (11th Cir. 1989). In Martorano, supra, the Eleventh Circuit held that the Defendant was barred from post-conviction relief because he could not show cause for his waiver at sentencing of the requirements of Rule 32(c)(3)(D), F.R.Cr.P., governing resolution of disputed facts in the



presentence investigation report. Id. at 285.

The Martorano case is distinguishable from the case at bar. Martorano waived compliance with Rule 32(c)(3)(D), F.R.Cr.P., after discussions with counsel. Petitioner, however, repeatedly, at both sentencings, plead with the Court to comply with Rule 32(c)(3)(D) to resolve factual disputes in the presentence investigation report. Petitioner's impaired mental state, flight, and ultimate suicide attempt, in effect, rendered her a pro se litigant and she did not have the benefit of counsel. The District Court in Martorano held that his waiver and subsequent post-conviction relief request was tantamount to sandbagging. The Court concluded that this was done to gain some tactical advantage at a later time.



Petitioner's case is void of any indication that the events leading up to her suicide attempt and ultimate post-conviction relief request (28 U.S.C., Section 2255) was done to gain a tactical advantage. In fact, the procedural default clearly put Petitioner in a worse position.

The Supreme Court in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), when addressing the issue of "cause", failed to state a definition of exactly what amounted to cause. The Supreme Court addressed the "cause" issue in Amadeo v. Zant, 108 S.Ct. 1771 (1988). Amadeo, a State prisoner in Georgia, had failed to raise an issue of constitutional magnitude on direct appeal and later brought the issue in a federal habeas corpus proceeding in the Middle District of Georgia. The Eleventh Circuit overruled the District Court finding that



the issue was not "readily discoverable" and that this constituted "cause" for failure to raise the claim. The United States Supreme Court reversed and remanded citing Reed v. Ross, 468 U.S. 1 (1984), wherein it was held that "although a 'tactical' or 'intentional' decision to forego a procedural opportunity normally cannot constitute cause,...the failure of Counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." (108 S.Ct. at 1776). Petitioner, a pro se litigant, should not be held to a higher standard than counsel referred to in Ross, supra.

The Court in Ross, supra, stated that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the





state's procedural rule." Cited in Murray v. Carrier, 477 U.S. 478 488, 106 S.Ct. 2639, 2646, 91 L.Ed 2d 397 (1986).

Petitioner, as a pro se litigant suffering from a psychological impairment, was unskilled in the law and unaware of her remedies. In effect, the Defendant's remedies were not reasonably discoverable. In Ross and Carrier, supra, the Court held that some external factor had caused the procedural default. The case at bar is analogous to an external impediment in that the Defendant's mental state, although internal, was a factor outside her control. Petitioner had no control over her situation.

Petitioner's actions in previously foregoing avenues for relief was not knowing or voluntary. As in Ross, supra, if a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has



cause for his failure to raise the claim in accordance with applicable state procedures. In the instant case, Petitioner's constitutional claim and remedies were novel and this Petitioner had no foundation in the law.

It is evident from the record that the District Court Judge, a man well-trained in the law, failed to comply with the Rule 32(c)(3)(D), F.R.Cr.P. The rule was amended in 1983 to require additional action from the Court in cases of factual disputes over the presentence investigation report. The Seventh Circuit in Kramer v. United States, 788 F.2d 1229 (1986) addressed this very notion regarding Rule 32(c)(3)(D) Fed.R.Crim.P. as follows: "As with many changes in rules, it takes time for the bench to adjust and to determine with any certainty how the changes are to be administered in practice." Id. at 1231. It is possible



in the Moody case that the Judge failed to comply because of the newness of this rule. This same excuse should apply to this Petitioner in her failure to exercise her remedies for the Court's non-compliance due to her unfamiliarity with the rule and her remedies.

The District Court below, relying on the Magistrate's Report and Recommendation, suggested that Petitioner's relief should come from the United States Parole Commission. This, however, is insensitive to the mandates of Rule 32(c)(3)(D), F.R.Cr.P., as amended in 1983. Because it has been established and recognized that the Parole Commission traditionally relies on the presentence investigation report in making its decisions regarding execution of sentence, the accuracy of the presentence investigation report is critical. The Defendant's opportunity to appear before



the Parole Commission did not excuse the Court's failure to comply with Rule 32(c)(3)(D).

The Magistrate was in error in finding that "Defendant [Moody] is represented by experienced and zealous habeas counsel. These considerations collectively demonstrate the absence of any legal "prejudice" that would justify excusing the defendant's procedural default." (R1-103-8).

Because of the District Court's failure to make findings and because of the ambiguity of the sentencing transcript, as to what the Court was actually basing its decision on, Petitioner was denied due process of law. This confusion in the record understandably left the United States Parole Commission with no clarity or direction as to exactly what the Court did rely upon in making its sentencing decision.





The decision in Petitioner's case rendered by the Eleventh Circuit, endorsing the opinion of the District court, is in direct conflict with the other circuit decisions regarding the significance of an accurate presentence investigation report for purposes of prison and parole. United States v. Eschweiler, 782 F.2d 1385 (7th Cir. 1986).

The Court in Kramer, supra, recognizing the novelty of rule 32(c)(3)(D) in 1986, three years after it was amended, permitted Appellant Kramer to raise Rule 32(c)(3)(D) claims in a Section 2255 proceeding. The Court stated:

Moreover, in the context of a new rule that had not been clearly interpreted at the time of the sentencing in this case, we hold that the defendant can bring his Section 2255 claim after direct appeal. Defendant had good cause in this case to raise his Rule 32(c)(3)(D) claim after direct appeal because it was not until he was before the Parole Board that he had an opportunity to learn that the sentencing judge did not attach a written finding to the defendant's



presentence report stating that the judge did not rely on the disputed amount of taxes when sentencing the defendant. Id. at 1231.

Petitioner Moody asserts that her first knowledge of the problem she now faces came after receiving a tentative parole assessment sheet from the United States Parole Commission indicating its reliance on the disputed matters in the presentence investigation report. These matters were never clarified by the Court by making the required findings. Nevertheless, reliance by the Commission on these matters has resulted in prejudice to her substantial rights..



## II.

WHETHER PETITIONER'S MENTAL IMPAIRMENT  
AND PRO SE STATUS CONSTITUTES CAUSE FOR  
HER PROCEDURAL DEFAULT FOR PURPOSES OF  
OBTAINING POST-CONVICTION RELIEF UNDER 28  
U.S.C. SECTION 2255?

1. The opinion of the Court of Appeals for the Eleventh Circuit is in conflict with decisions of other federal courts of appeal on the same matters.
2. The opinion of the Court of Appeals for the Eleventh Circuit decided a federal question in a way in conflict with applicable decisions of the Supreme Court.



## ARGUMENT AND AUTHORITIES

It is uncontroverted in Petitioner's case that the District Court failed to comply with Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure. It is equally uncontroverted that the Petitioner suffered prejudice as a result of the Court's non-compliance with the rule. Thus the only question for decision below was whether or not there was cause for Petitioner Moody's procedural default in not raising this constitutional violation on direct appeal or in a motion filed under Rule 35(b), F.R.Cr.P.

The Eleventh Circuit's per curiam (without opinion) ruling in Petitioner's case affirms the District Court's finding Petitioner failed to show cause for her procedural default. Petitioner stood on the fact that she was mentally impaired prior to the offense, during the offense, during her first sentencing, when she went





to federal prison for a study and observation, during her second sentencing, after her sentencing when she fled, during her serious suicide attempt, and after being remanded to custody. Additionally, she submitted that she was a pro se litigant after the second sentencing, during the time of her flight, and through the first two years of her confinement.

The position taken by the Eleventh Circuit in Petitioner's case is contrary to holdings in the Eighth and First Circuits regarding these issues and also contrary to this Court's holdings. Other circuits' rulings regarding exceptions for pro se litigants are contrary to the ruling in this case. See Thunder v. United States, 810 F.2d 817 (8th Cir. 1987); United States v. Craig, 1827 F.2d 393 (8th Cir. 1987); Davis v. United States, 464 F.2d 1009 (6th Cir. 1972);



Camp v. United States, 352 F.2d 800 (5th Cir. 1965); Harris v. Green, 750 F.2d 617 (7th Cir. 1984).

In Craig, supra, the Eighth Circuit made clear that the cause standard for counselled defendants is more stringent than the standard for uncounselled defendants. Petitioner Moody is entitled to have such a standard applied to her case.

In Poor Thunder, supra, the Court affirmed the District Court's dismissal of Petitioner Thunder's motion filed pursuant to 28 U.S.C., Section 2255. Nevertheless, in Poor Thunder there is strong support for Petitioner's contention that pro se litigants should be given leeway in failing to meet time deadlines required of lawyers.

In the Poor Thunder case, the Petitioner filed a post-judgment collateral attack on his sentence alleging that the Court



failed to comply with Rule 32(c)(3)(D), F.R.Cr.P. In this case, as in Poor Thunder, the Petitioner pled guilty and did not file a direct appeal challenging her sentencing. Poor Thunder, after arriving at prison, realized the Court had not appended to his Pre-Sentence Investigation Report findings regarding disputed matters in the Pre-Sentence Investigation Report. Poor Thunder filed a motion under Rule 35, F.R.Cr.P., and alleged, among other things, Rule 32 violations. The Court denied the motion but still failed to comply with Rule 32, F.R.Cr.P. A year later, Poor Thunder brought a Section 2255 proceeding alleging the same facts. From the denial of his petition, Poor Thunder appealed to the Court of Appeals.

The Poor Thunder court held that violations of Rule 32(c)(3)(D), F.R.Cr.P. were more serious than other Rule 32



violations due to the need for factual accuracy in a key sentencing document.

The Court stated:

It remains to deal with the argument that Poor Thunder should not be allowed to raise it now because he could have, but did not, raise it on direct appeal from his sentence, or on appeal from the denial of his Rule 35 Motion. We think neither of these procedural omissions is a bar in this case. There was no direct appeal from the conviction or sentence, but the very existence of Rule 35(a), specifically providing a post-judgement, collateral remedy for sentences imposed in an illegal manner, shows that direct appeal is not the exclusive avenue for this kind of complaint. That conclusion to be sure, shows only that a Rule 35 remedy was available, and not that a Section 2255 proceeding should lie despite defendant's failure to pursue fully his Rule 35 Motion by appealing its denial to us. Section 2255 Motions are no substitute for appeal, and normally a collateral attack should not be entertained if defendant failed, for no good reason, to use another available relief. (Emphasis added). Id. at 823.

The Court went on to evaluate the adequacy of an asserted reason or excuse. Poor Thunder stated that his reason for failure to appeal the denial of his Rule





35 motion was that he was a pro se litigant and did not know appeal remedies were available from denial of his Rule 35 motion. In response, the court stated:

This statement, while wrong as a matter of law, is nevertheless an excusable default on the part of an uncounseled criminal defendant. (Poor Thunder had no lawyer at the time of his Rule 35 Motion.) We are unwilling to apply doctrines of procedural default with full rigor against litigants without lawyers. Id. at 823.

Clearly, the situation in Poor Thunder is analogous to the one in this case. Petitioner fled after sentencing, attempted suicide, and did not return until the filing time was over for filing an appeal from her sentence. As stated in the record, she was without counsel when she filed her Rule 35 motion. Petitioner, a pro se litigant, was not skilled and trained in the law and post-conviction remedies.



Although the facts of Poor Thunder are analogous to this case, application of the Court's reasoning leads to a different conclusion from that reached Poor Thunder. The ruling in Poor Thunder was based upon the Court's finding that no substantial rights protected by Rule 32 had been violated. To the contrary, in this case her assertions that her substantial rights were violated went uncontroverted. In this case, the record is clear that the District Court never made known its factual basis for its sentencing decision. Further, Petitioner's claim that prejudice had occurred was never disputed by the Government.

Assuming, without conceding the validity of the Eleventh Circuit's determination, that Petitioner's statement of cause for her procedural default was insufficient on the basis of her flight being a volitional act, it is still a fact that after



apprehension and incarceration, Petitioner filed an untimely pro se Rule 35 motion which failed to raise the constitutional issues. The Eleventh Circuit's rigid application of the rules under these attenuated circumstances is contrary to the Eighth Circuit opinion in Poor Thunder, supra.

Moreover, the holding of the Eleventh Circuit in Petitioner's case is contrary to precedent in that Circuit regarding the standards for pro se litigants. Gunn v. Newsome, \_\_\_F.2d\_\_\_ (11th Cir. No. 87-8287, August 7, 1989).

The Eleventh Circuit decided Petitioner's case exactly one month after the decision issued in Newsome, supra. Petitioner was unable to obtain this decision within the timeframe for filing a petition for rehearing en banc.

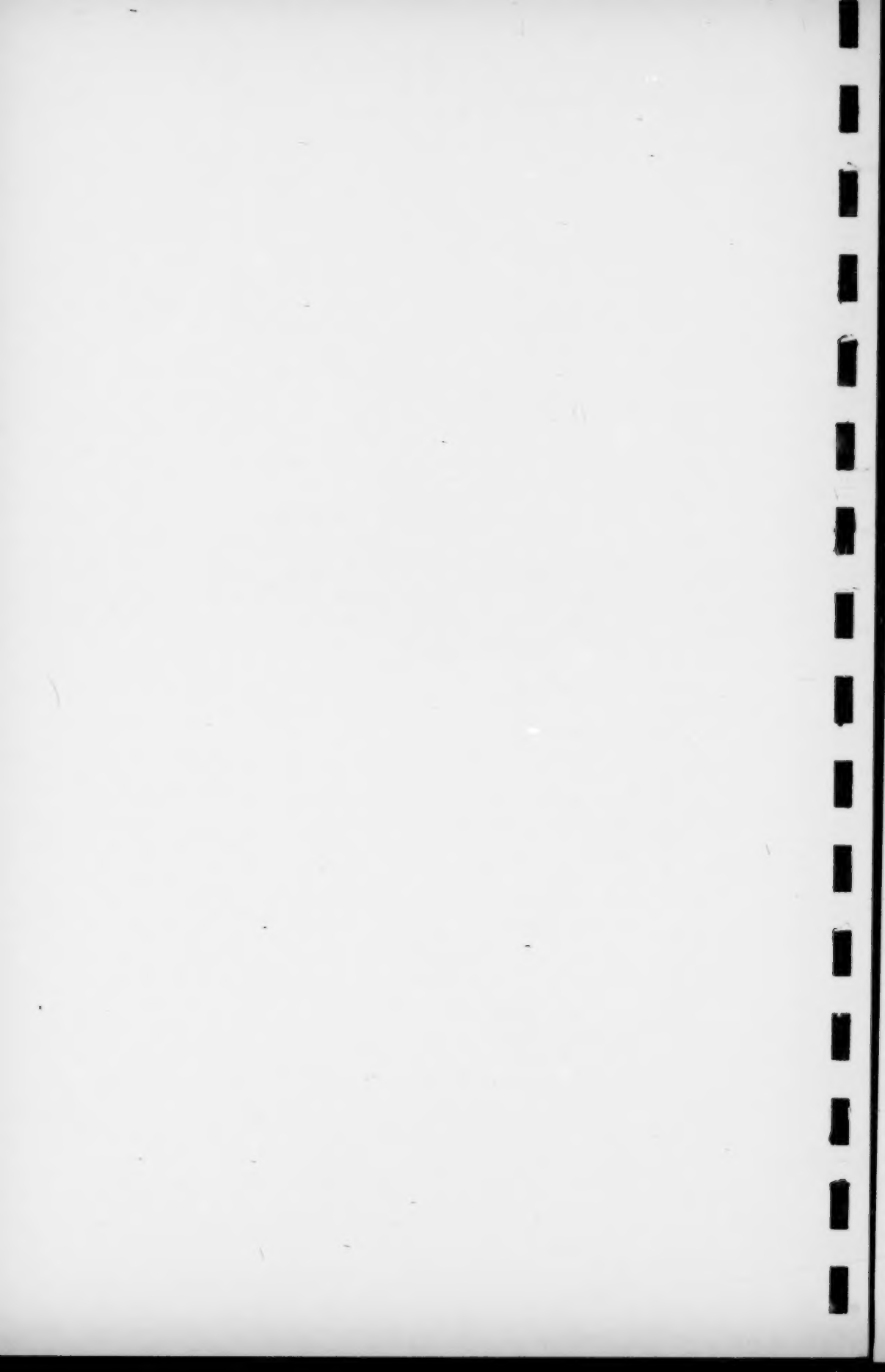
In Davis v. United States, supra, the Court addressed a situation wherein an



indigent defendant was not advised by the Court at sentencing of the right to appeal. After Defendant's court-appointed counsel withdrew from the case after sentencing, defendant was not advised of his post-convictions options. The Davis Court held:

...at sentencing the Trial Judge did not advise the defendant concerning his appellate rights. After sentencing, appointed counsel abandoned the case, without apprising the defendant of the procedure for perfecting an appeal. Following his conviction the indigent defendant was left alone, uninformed, unadvised, and unrepresented. His right to appeal was lost. The rules and practices of the federal criminal process had coalesced to create a gap in the system's protection of an indigent defendant's valid rights.  
Id. at 1014.

The case at bar is analogous except that Petitioner Moody abandoned retained counsel. Due process requires the same result in this case as reached in Davis, supra., because the circumstances still rendered Petitioner Moody uninformed,









is contrary to the decision in United States v. Latham, 874 F.2d 852 (1st Cir. 1989). In that case, the defendant absented himself from trial by ingesting a lethal amount of cocaine. The Latham court held that this was not a case of flight to avoid trial altogether, and that it defied common sense to conclude that a defendant would attempt suicide to avoid trial, or that he would ingest enough cocaine to require hospitalization in an attempt to postpone the proceedings.

The Latham court held that the reasons presented by the government on appeal or by the District Court in its rulings did not explain how a voluntary absence from trial can be predicated upon a voluntary ingestion of a near lethal dose of cocaine. It further held that the Government's proffered reasons were insufficient for a finding of voluntary absence so as to waive a basic



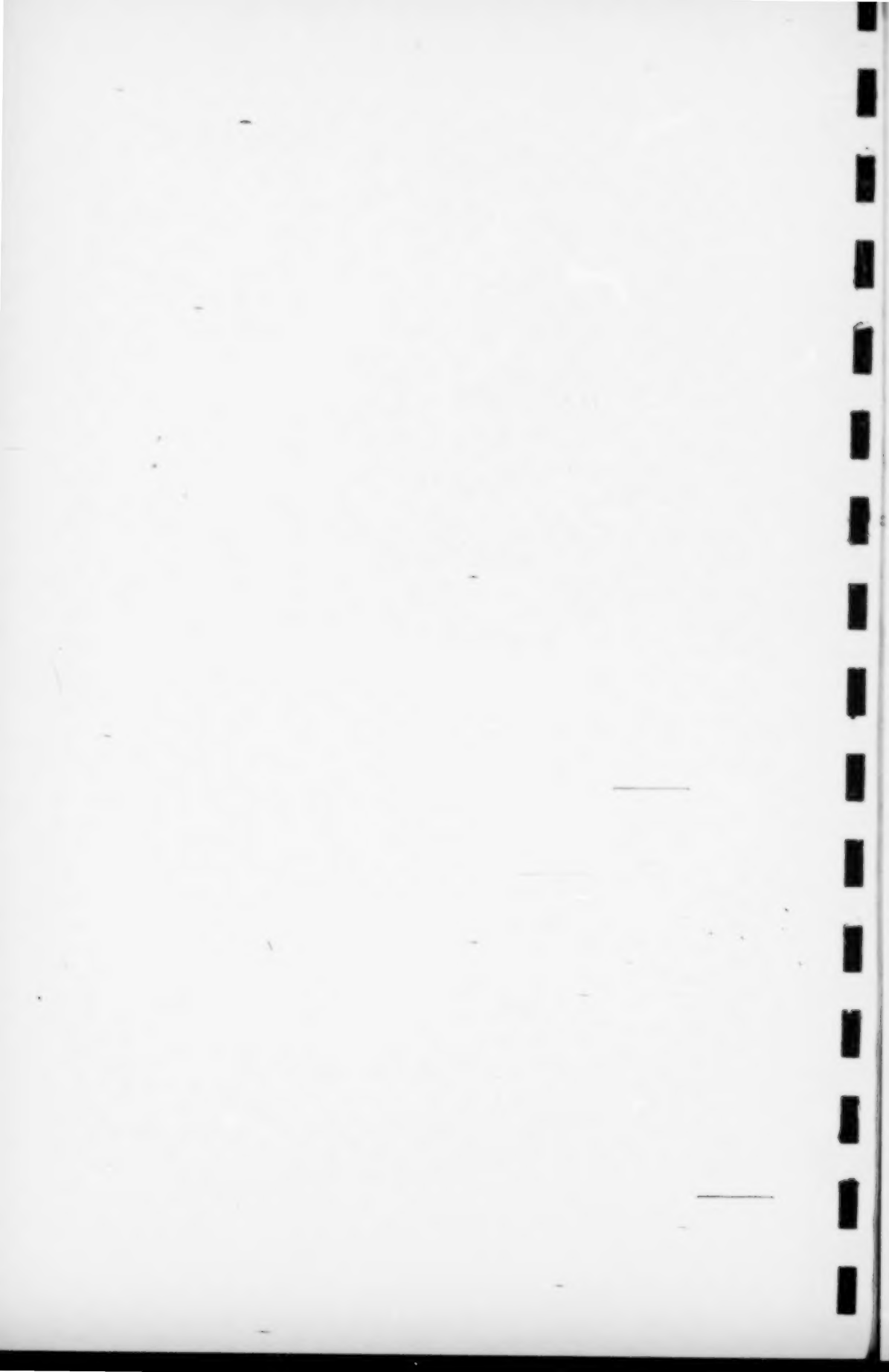
constitutional right. For this reason, the District Court's holding was clearly erroneous. The failure of the District Court to conduct an evidentiary hearing to determine Petitioner's mental capacity in regard to the cause for her flight and suicide attempt constituted an abuse of discretion.

The Court's denial of an evidentiary hearing in this case precluded Defendant from further establishing "cause" for her procedural default. The facts of Petitioner Moody's case, like those in Latham, supra, support the conclusion that it defies common sense for her to flee and attempt suicide in order to gain some tactical advantage. It has been well settled in other circuits that proof of a deliberate bypass, the cause and prejudice predecessor standard for procedural default, usually involved a showing that the petitioner sought to gain a tactical



or strategic advantage by foregoing the direct appeal. United States v. Capua, 656 F.2d 1033 (5th Cir. 1981); Buckelew v. United States, 575 F.2d 519 (5th Cir. 1978). Petitioner Moody had nothing to gain by foregoing her direct appeal. Estelle v. Williams, 425 U.S. 501, 524, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

The Fifth Circuit held that the District Court properly entertained a Motion to Vacate under Section 2255 where Movant had voluntarily dismissed his appeal when it was established that Petitioner did so to expedite the case and reduce expense rather than attempt to seize a legal or tactical advantage. Sosa v. United States, 550 F.2d 244 (5th Cir. 1977). Petitioner Moody has contended that her flight was not a volitional act and that her mental state was such that she was rendered incapable of handling her legal affairs as a pro se litigant at the time





of her flight, during her serious suicide attempt, during her hospitalization, and after her remand to custody. However, the District Court accepted the Magistrate's Report and Recommendation that "petitioner's flight was a volitional act and one for which she must bear the sole responsibility". (R1-103-6).

The American Heritage Dictionary (2nd Edition) defines volition as the "power or capability of choosing". Petitioner Moody's departure was not a volitional act as she had no control over her conduct and thus no power or capability of choosing what she did.

In Latham, it was held:

We conclude that ingestion by Latham of an overdose of cocaine did not constitute a voluntary absence from trial, and the district court's holding that he had thereby waived his constitutional right to be present at his trial was clearly erroneous.

Id. at 899.



The Eleventh Circuit's affirmation of the District Court's holding that this Petitioner should be held accountable for the consequences of her flight and be precluded from exercising the remedies she elected to forego, is contrary to the previous rulings of this Court where time bars were excused due to circumstances beyond this prisoner's control. This Court, in Fallen v. United States, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed.2d 760, (1964), excused the timeliness requirement under Rule 37(a)(2), Federal Rules of Criminal Procedure, where the appellant had no control over the delay due to bodily infirmities.

The message in the Fallen case clearly indicated that the Federal Rules of Criminal Procedure are not a rigid code having an inflexible meaning irrespective of the circumstances. In Fallen the Court held when "petitioner did all he could



under the circumstances" to comply with the time limitations of a Rule of Criminal Procedure, the Court should "decline to read the Rules so rigidly as to bar a determination of his appeal on the merits". Id. at 764.

This case raises the question of whether or not society's interest in finality of judgment outweighs a defendant's right to the safeguards afforded by the Constitution. The Eleventh Circuit has ruled (without opinion) that the District Court's decision should be affirmed. The merits of Petitioner's Section 2255 motion were never reached due to the District Court's ruling that the Petitioner could not show cause for her procedural default due to her flight from custody being considered a volitional act.

Historically, this Court has held that there are some valid reasons for procedural default. It is well settled



that a procedural default to gain a tactical advantage is impermissible. In Reed v. Ross, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984), the Court held:

On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interest.

Id. at 14.

If "counsel" is given a reprieve in certain instances for procedural default when it is determined that failure was not an intentional decision to aid a client, should not the same exception be given to a pro se litigant operating under diminished mental capacity during the time that the procedural clock was running and the mental defect in place?





### III.

WHETHER THE COURT OF APPEALS ERRED IN UPHOLDING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO ALTER, AMEND, OR VACATE SENTENCE FOR FAILURE TO SHOW CAUSE FOR HER PROCEDURAL DEFAULT WITHOUT ORDERING A HEARING TO RESOLVE FACTUAL ISSUES NOT EVIDENT FROM A REVIEW OF THE RECORD.

1. The opinion of the Court of Appeals for the Eleventh Circuit is in conflict with the decision of another federal court of appeals on the same matter.
2. The opinion of the Court of Appeals for the Eleventh Circuit decided a federal question in a way in conflict with applicable



decisions of the Supreme Court.

#### ARGUMENT AND AUTHORITIES

The Eleventh Circuit relied on United States v. Holmes, 680 F.2d 1372 (1982), which held that a defendant who flees after conviction but before sentencing waives his right to appeal from his conviction unless he can establish that his absence was due to matters completely beyond his control. The case at bar falls into the exception cited by the Court in that the cause of her flight (mental impairment) made the flight and surrounding circumstances beyond her control.

The Eleventh Circuit in Petitioner's case affirmed the District Court's decision that the Petitioner's flight was volitional. However, the critical issue of this Petitioner's mental state at the



time of the flight, during her suicide attempt, and after her apprehension and incarceration, was never addressed.

Petitioner, relying on the record below, submitted that the evidence was overwhelming that she was mentally impaired at the time of her flight. To be sure, Petitioner requested an evidentiary hearing if the Court had any doubt about this assertion. The Eleventh Circuit's affirmance of the District Court's denial of Petitioner's motion filed under 28 U.S.C., Section 2255 was in conflict with prior holdings of this Court regarding hearings to resolve factual issues not clearly set out in the record.

The language of Section 2255 instructs as follows:

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney grant a prompt hearing thereon, determine the issues



and make findings of fact and conclusions of law with respect thereto. (28 U.S.C., Section 2255.

The statute calls for an evidentiary hearing unless the motion, files, and records of the case conclusively show that the petitioner is entitled to no relief. Fontaine v. United States, 411 U.S. 213, 96 S.Ct. 1461, 36 L.Ed.2d 169 (1973) (per curiam).

The Defendant, denied of an opportunity to be heard, "has lost something indispensable, however, convincing the ex parte showing." United States v. Hayman, 342 U.S. 205, 220, 72 S.Ct. 263, 96 L.Ed. 232 (1952) citing Snyder v. Massachusetts, 291 U.S. 97 (1934). The Eleventh Circuit erred in affirming the District Court's finding that Petitioner's flight was volitional without ordering that an evidentiary hearing be conducted to resolve any dispute over her mental state





which she submits justified her procedural default.

The affirmance of the District Court's dismissal of Petitioner's 2255 Motion without hearing in the face of factual disputes, unresolved through a review of the record, is contrary to holdings in this Court and other circuits regarding this matter.

The facts in Fontaine, supra, are analogous to this case. Fontaine, alleging physical problems contributing to his conduct prior to arrest, indicated that the record in the District Court, as in Moody, did not conclusively show that he was entitled to no relief. United States v. Kovic, 830 F.2d 680 (7th Cir. 1987); Baumann v. United States, 692 F.2d 565 (9th Cir. 1982); Friedman v. United States, 588 F.2d 1010 (1979).

The Ninth Circuit in Baumann, supra, held that "a hearing is mandatory whenever



the record does not affirmatively manifest the factual or legal invalidity of the petitioner's claims." (Baumann, supra, at 571).

The Fifth Circuit, in Friedman, supra, addressed a possible justification for the trial court's failure to grant an evidentiary hearing when the record on disputed facts was inclusive by permitting the judge's reliance on his personal observations of the case.

Petitioner's case represents a contrary scenario for two reasons. The first is that the trial court, in its opinion, failed to address the dismissal in the absence of an evidentiary hearing. Secondly, to be sure, dismissal without a hearing on disputed facts based on an inconclusive record and the judge's personal observations would also fail in this case. The reason is that the judge's recollection of this case, as evidenced in



the sentencing transcripts (R\_\_\_-85-36) and (R\_\_\_-86-23) the imposition of a study and observation, and the mental health counselling recommendation on the Judgement and Commitment Order (R\_\_\_-62-1) indicates that the judge's observations of the case should support Petitioner's claim of mental defect excusing her procedural default. -

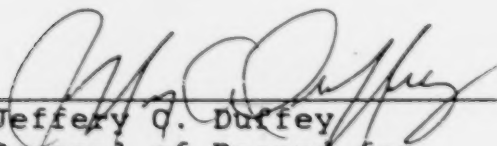


## CONCLUSION

A Writ of Certiorari should be granted in this case to consider whether a federal habeas corpus petitioner can show cause for a procedural default in failure to raise an issue of constitutional magnitude by establishing mental impairment and while acting as a pro se litigant. A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted:

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Counsel of Record for  
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CERTIFICATE OF SERVICE

On this 6<sup>TH</sup> day of November, 1989, I, Jeffery C. Duffey, the undersigned attorney and co-counsel of record for Petitioner, BARBARA KOUCKY MOODY, do hereby certify that I am a member of the bar of the United States Supreme Court, that I have previously entered my appearance in this cause, and that all parties required to be served have been served. A true and correct copy of the foregoing Petition for Writ of Certiorari has been duly served upon counsel for the United States by depositing said document in a United States post office or mail box with first-class postage prepaid addressed to counsel of record, the Solicitor General, at the following post office address, Department of Justice, Washington, D.C. 20530, in accordance with Rule 28.3,



DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 88-3978

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D. C. Docket Nos. 88-40092, 84-07037

BARBARA KOUCKY MOODY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

---

Appeal from the United States District Court  
for the Northern District of Florida

---

(September 7, 1989)

Before ANDERSON and EDMONDSON, Circuit Judges, and HENDERSON,  
Senior Circuit Judge.

PER CURIAM:

**AFFIRMED. See Eleventh Circuit Rule 36-1.**

Judgment Entered: September 7, 1989  
For the Court: Miguel J. Cortez, Clerk

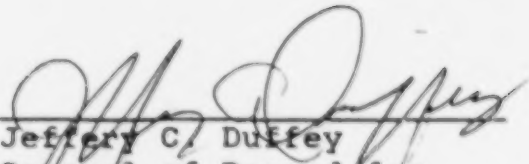
By:

Karl J. Maw  
Deputy Clerk

ISSUED AS MANDATE: October 2, 1989



28.4(a), and 28.5(b) of the Rules of the  
United States Supreme Court.



Jeffery C. Duffey  
Counsel of Record for  
Petitioner



AFFIDAVIT OF MAILING

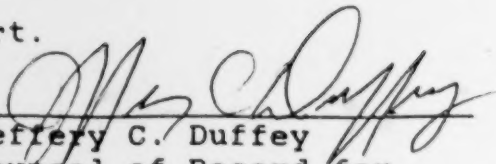
On this 6<sup>th</sup> day of November, 1989,

I, Jeffery C. Duffey, the undersigned attorney and co-counsel of record for Petitioner, BARBARA KOUCKY MOODY, do hereby certify that I am a member of the bar of the United States Supreme Court, and that I have previously entered my appearance in this cause. Enclosed herewith is the original Petition for Writ of Certiorari which has been, to my knowledge, filed within the time specified for filing by depositing said document on this day in a United States post office with first-class postage prepaid addressed to the Office of the Clerk, Supreme Court of the United States, Washington, D.C. 20543 in accordance with





Rule 28.2 of the Rules of the United  
States Supreme Court.

  
Jeffery C. Duffey  
Counsel of Record for  
Petitioner

THE STATE OF ALABAMA

COUNTY OF MONTGOMERY

Before me, the undersigned authority, a  
Notary Public in and for the State of  
Alabama, on this day personally appeared  
Jeffery C. Duffey, known to me to be the  
person whose name is subscribed to the  
foregoing Affidavit of Mailing, and who  
acknowledged to me that he executed the  
same for the purposes and consideration  
therein expressed. Given under my hand  
and seal of office:

on this the 6<sup>TH</sup> day of  
November, 1989.



Michelle Davis Ross

Notary Public in and for the

STATE OF ALABAMA

My Comm. Exp. 5-31-93



**APPENDIX**



APPENDIX A





DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 88-3978

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(September 7, 1989)

Before ANDERSON and EDMONDSON, Circuit Judges, and HENDERSON,  
Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Eleventh Circuit Rule 36-1.

Judgment Entered: September 7, 1989  
For the Court: Miquel J. Cortez, Clerk

By:

Karleen McNamee  
Deputy Clerk

ISSUED AS MANDATE: October 2, 1989



APPENDIX B



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

TCR 84-07037-WS  
TCA 88-40092-WS

v.

ORDER

BARBARA KOUCKY MOODY,

Defendant.

---

The above-styled cause is before the court upon the magistrate's report and recommendation and the movant's objections thereto. See documents 103 and 104, as supplemented by document 107. Movant Barbara Koucky Moody has filed a motion to vacate, set aside or correct sentence pursuant to Title 28, United States Code, Section 2255. The government responded with a motion to dismiss and after due consideration, the magistrate recommended that Ms. Moody's motion be dismissed due to her procedural default. Having carefully reviewed the pleadings and the relevant cases, the court concludes that the report and recommendation should be adopted, as modified and supplemented by this order.

FILED OF CLERK  
U.S. DISTRICT COURT  
TALLAHASSEE, FLORIDA  
JAN 12 1989

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